the donor's death, the courts should presume that he, as a reasonable man, would prefer changes whereby his general intent would be more efficiently executed to strict obedience to his directions.[24] Moreover, equity does not enforce bequests subject to freakish conditions or uses, such as a gift to a school with a provision that the descendants of certain persons should be excluded therefrom for one hundred years,[25] or a devise of a house on trust with directions that it be bricked up for twenty years.[26] In refusing to enforce these, equity prevents needless economic waste. For the same reason equity should not insist upon literal obedience to the terms of a charitable trust when, with advancement in civilization, the wisdom of the particular manner of use prescribed is denied or seriously questioned, or when the execution of the particular intent becomes economically wasteful to a considerable degree.[27]

DEDUCTION FOR BENEFITS RECEIVED BY THE PURCHASER ON RESCISSION FOR BREACH OF WARRANTY. — All courts agree that rescission will not be granted where any benefit that has been received under the contract cannot be restored.[1] The difficulty, however, lies in defining precisely what constitutes a sufficient benefit to bar rescission. In England the most nominal benefit has been held enough,[2] while the United States courts have given a less literal interpretation to the term.[3] If this rule is strictly applied to the law of sales, it may be said that in every case where title has passed the purchaser must have received some

[24] In the following *cy-près* application was allowed, although literal obedience was still possible. Attorney-General *v.* Haberdashers' Co., 3 Russ. 530 (1825); Tincher *v.* Arnold, 147 Fed. 665 (1906); Norris *v.* Loomis, 215 Mass. 344, 102 N. E. 419 (1913); Ely *v.* Attorney-General, 202 Mass. 545, 89 N. E. 166 (1909); Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414 (1899); St. James's Church *v.* Wilson, 82 N. J. Eq. 546, 89 Atl. 519 (1913); McIntire *v.* Zanesville, 17 Ohio, 352 (1848); Avery *v.* Home for Orphans, 228 Pa. 58, 77 Atl. 241 (1910); Brown *v.* Meeting Street Baptist Soc., 9 R. I. 177 (1869). In the following *cy-près* application was not allowed on account of expediency: *Re* Weir Hospital, *supra;* Harvard College *v.* Attorney-General, *supra.* And in the following the trust was held to fail for lack of a general charitable intent: *Re* Parker, [1918] 1 Ch. 437; *Re* Wilson, [1913] 1 Ch. 314; Bowden *v.* Brown, 200 Mass. 269, 86 N. E. 351 (1908); Teel *v.* Bishop of Derry, 168 Mass. 341, 47 N. E. 422 (1897); Morristown Trust Co. *v.* Morristown, 82 N. J. Eq. 521, 91 Atl. 736 (1913). If the original gift is to take effect only on a condition precedent, which is not performed, the bequest fails wholly. *Re* University of London Medical Funds, [1909] 2 Ch. 1; Cherry *v.* Mott, 1 Mylne & C. 123 (1835).

[25] Nourse *v.* Merriam, 8 Cush. (Mass.) 11 (1851).

[26] Brown *v.* Burdett, 21 Ch. Div. 667 (1882). See also 65 U. P. LAW REV. 527, 632.

[27] An interesting analogy tending to uphold a more liberal use of *cy-près* is found in the fact that equity does not enforce a restrictive covenant if circumstances have so changed from the time the covenant was made that its enforcement would injure both the dominant and servient tenements. Sayers *v.* Collyer, 28 Ch. Div. 103 (1884); Jackson *v.* Stevenson, 156 Mass. 496, 31 N. E. 691 (1892).

[1] WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 342, 343.

[2] In Hunt *v.* Silk, 5 East 449 (1804), where the plaintiff was not allowed to rescind for the lessor's failure to repair, Lord Ellenborough said, "if the plaintiff might occupy the premises two days beyond the time . . . and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account." Beed *v.* Blandford, 2 Y. & J. 278 (1828).

[3] Ankeny *v.* Clark, 148 U. S. 345 (1893); Campbell Printing Press Co. *v.* Marsh, 20 Colo. 22, 36 Pac. 799 (1894). See note 6, *post.*

benefit, however brief his retention of the goods. This rigid application of the rule is one reason why rescission of an executed sale for breach of warranty is not allowed in England,[4] the purchaser being restricted solely to his action for damages.[5] In the United States, however, such temporary ownership and use of the property as is necessary to discover the defect is not considered a sufficient benefit to prevent rescission, and a majority of the states now permit this remedy for breach of warranty.[6] The American law on this point seems to reach the more just result. Such a brief retention of the property seldom confers any actual benefit upon the purchaser, while to compel him to keep defective goods and allow him a recovery only in damages causes real hardship. All jurisdictions allow rescission of an executed sale induced by fraud.[7] But whether the seller acted in good faith or bad faith, the purchaser is equally injured by the seller's breach.[8] In view of this hardship upon the purchaser the English courts have sometimes gone to considerable lengths in order to allow rescission in effect by finding that the title never passed.[9]

But a real difficulty arises where the buyer has retained title to the goods for a substantial period of time and has received a substantial benefit before a latent defect could reasonably have been discovered. Even though the buyer has received some benefit, to forbid rescission would still cause considerable hardship. But in this case there is a new factor to be considered. Ordinarily the seller suffers no injustice by rescission, but under these circumstances there is an obvious hardship in requiring him to take back the property without any compensation for its use by the purchaser. Courts following the English doctrine would of course restrict the purchaser to his action for damages,[10] while the American courts, even in this case, would probably allow the buyer to rescind and recover the whole purchase price.[11] Neither result accords with principles of justice. A recent Canadian case illustrates a more just solution of the difficulty — a compromise between these two opposite extremes. In *Cushman Motor Works, Ltd.* v. *Laing* [12] the company sold to the defendant what purported to be a twenty-five horse-power thresh-

[4] Street *v.* Blay, 2 B. & Ad. 456 (1831). See SALES OF GOODS ACT, 56 & 57 Vict., Chap. 71, § 11 (1). See also 15 HARV. L. REV. 148. In the case of a warranty a further ground for refusing rescission in England is that the warranty is said to be collateral to the principal contract. But the English law attempts to distinguish a condition from a warranty and, if the title has not passed, allow the purchaser to reject the goods for a breach of the former. "The essential thing . . . is whether the contract is executed or executory." See Samuel Williston, "Rescission for Breach of Warranty," 16 HARV. L. REV. 465.

[5] See note 4, *supra*.

[6] Edson *v.* Mancebo, 173 Pac. (Cal.) 484 (1918); Roper *v.* Wells, 182 Iowa 237, 165 N. W. 385 (1917); Wilson *v.* Solberg, 145 Wis. 573, 130 N. W. 472 (1911). For other cases on this point, see WILLISTON ON SALES, § 608, note 90. See UNIFORM SALES ACT, § 69 (1), (d).

[7] See WILLISTON ON SALES, § 608, 647. See MECHEM ON SALES, § 932.

[8] "A breach of warranty may be equally injurious to the buyer whether the vendor acted in good faith or bad faith." Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77 (1896).

[9] Varley *v.* Whipp, [1900] 1 Q. B. 513.

[10] See note 5, *supra*.

[11] See note 6, *supra*. In Roper *v.* Wells, *supra*, the purchaser was allowed to return the goods after three years' use without paying any part of the purchase price.

[12] 49 D. L. R. 1 (1919).

ing engine, which after two years' usage was discovered to have an actual capacity of only twenty-two horse-power. Upon suit by the plaintiff to recover the unpaid installments of the purchase price the defendant claimed the right to reject the engine and to recover the installments already paid. It was held that the defendant could recover the payments he had made, less $204, upon return of the engine to the seller. It was evident that the variation in horse-power could not reasonably have been discovered before. But to avoid the harsh operation of the English rule the court was forced to strain the facts in order to find that the representation was a condition of the sale and that title had never passed. However, on the findings the decision reaches a just result. The interesting feature of the case is that the seller was allowed to retain part of the purchase price. Curiously, however, the Canadian court did not state the basis upon which this deduction was estimated. One possible measure of the deduction might be the deterioration in value of the engine, but there seems to be no authority for this basis of calculation.[13] Probably the deduction was the estimated value of the benefit conferred upon the purchaser — a value based upon the principles of quasi-contract for unjust enrichment. This seems to be a more logical basis, and there is some authority to support such a deduction.[14] The adoption of the solution offered by the Canadian court would afford a practical and just rule for every case of breach of warranty — the buyer should be allowed to rescind on condition that he compensate the seller for any actual benefit received. In England, if this rule were applied, an attempt to value the purchaser's title for a day would prove the futility of offering such a benefit as a bar to rescission. The adoption in the United States of this solution would remove any possibility of hardship upon the seller.

RECENT CASES

AGENCY — AGENT'S LIABILITY TO THIRD PERSONS — WRITTEN CONTRACT FOR UNDISCLOSED PRINCIPAL. — An action was brought against the agent for failure to deliver goods under a written contract in which he described himself as "manufacturers' selling agent" and signed his own name. No other evidence having been offered, the lower court dismissed the complaint. *Held*, that a new trial be granted. *Levy* v. *Shour*, 178 N. Y. Supp. 227.

For a discussion of the principles involved in this case, see NOTES, p. 591, *supra*.

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[13] In Rice *v.* Butler, 160 N. Y. 578, 55 N. E. 275 (1899), the court calculated the deduction either as the value of the benefit received by the purchaser or as the amount of the deterioration in the property.

[14] Todd *v.* Leach, 100 Ga. 227, 28 S. E. 43 (1897); Wilson *v.* Burks, 71 Ga. 862 (1883); Baston *v.* Clifford, 68 Ill. 67 (1873); Syck *v.* Hellier, 140 Ky. 388, 131 S. W. 30 (1910); Vanatter *v.* Marquardt, 134 Mich. 99, 95 N. W. 977 (1903); Todd *v.* McLaughlin, 125 Mich. 268, 84 N. W. 146 (1900); Johnson *v.* Northwestern Mutual Life Ins. Co., 56 Minn. 365, 59 N. W. 992 (1894); Kicks *v.* State Bank of Lisbon, 12 N. D. 576, 98 N. W. 408 (1904); Hall *v.* Butterfield, 59 N. H. 354 (1879); Rice *v.* Butler, *supra*; Mason *v.* Lawing, 10 Lea. (Tenn.) 264 (1882). See KEENER ON QUASI-CONTRACTS, 305, 306. See WOODWARD ON QUASI-CONTRACTS, § 266. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 343, 344. See Samuel Williston, "Repudiation of Contracts," 14 HARV. L. REV. 326–328. See 13 HARV. L. REV. 410.